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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,
Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, THE STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally-licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. NEP appeals from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

1. Whether the New Hampshire statute as applied by the PUC to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the statute as applied by the PUC.

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to rearrange its existing wholesale tariffs and contracts to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens.

PARTIES TO THE PROCEEDING BELOW

All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

Appellant New England Power Company is a wholly-owned subsidiary of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* Appellant is a parent of Connecticut Yankee Atomic Power Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Yankee Atomic Electric Company and an affiliate of Granite State Electric Company, Massachusetts Electric Company, The Narragansett Electric Company and New England Energy Incorporated.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court (App. A, *infra*, pp. 1a-14a) is not yet reported. The PUC's Report and Order dated August 27, 1980 (App. B, *infra*, pp. 15a-24a) and its Report and Order dated September 19, 1980 (App. C, *infra*, pp. 25a-40a) are also unreported.

JURISDICTION

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire

statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state. The court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that court was docketed by its clerk. A notice of appeal was filed below on January 12, 1981 (App. D, *infra*, p. 41a). This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, NH RSA 374:35, under the Commerce and Supremacy Clauses of the United States Constitution (art. I, § 8, cl. 3 and art. VI, cl. 2) and the Federal Power Act (16 U.S.C. §§ 792-824k).

NH RSA 374:35 provides:

> Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

Article I, Section 8, clause 3 of the United States Constitution provides:

> The Congress shall have Power
>
> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes; . . .

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant portions of the Federal Power Act are set forth in Appendix E, *infra*, pp. 42a-46a.

STATEMENT OF THE CASE

This case involves an attempt by one state to secure the economic benefits of one of its natural resources exclusively for the benefit of its own citizens. The resource in question — hydroelectric energy — is currently delivered to a highly integrated, regional transmission grid serving all of New England. The New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling the energy outside of New Hampshire. The immediate result of the order, if allowed to stand, will be higher electric rates for many Rhode Island and Massachusetts consumers and lower rates in New Hampshire.

A. Facts

NEP is a public utility which generates and transmits electricity at wholesale in interstate commerce. Its principal customers are three retail affiliates which resell the electricity at retail to over one million customers in Massachusetts, Rhode Island and New Hampshire. About 420 megawatts of NEP's total generating capacity consists of hydroelectric units located within New Hampshire on the Connecticut River. These hydroelectric units are all licensed by the Federal Energy Regulatory Commission ("FERC"), successor to the Federal Power Commission, under Part I of the Federal Power Act (App. A, p. 2a).

NEP is a member of the New England Power Pool ("NEPOOL"), a highly integrated, regional power pool whose members own virtually all of the bulk generation and transmission facilities located in the six-state New England region (App. A, p. 3a). All of NEP's generating units, including the Connecticut River plants, are connected to the regional transmission network. NEP's units and all other major New England generating units are dispatched by NEPOOL on an economic basis without regard to generation ownership or state lines. All energy so generated flows freely in the transmission network throughout the six-state region (NEP Exs. 2; 7, pp. 1-3).[1]

NEP's wholesale sales are comprehensively regulated by FERC under Part II of the Federal Power Act (App. A, p. 9a). The costs and benefits of its hydroelectric units, as well as its other units, are allocated to its customers in Massachusetts, Rhode Island, and New Hampshire through rates and contracts on file with and approved by FERC. In addition, the dispatch of NEP's units by NEPOOL is

[1] References are to the record before the PUC.

governed by an agreement investigated and approved by FERC under Part II. *New England Power Pool Agreement*, Opinion 775 (FPC, 1976), *affirmed*, *Municipalities of Groton* v. *Federal Energy Regulatory Commission*, 587 F.2d. 1296 (D.C. Cir. 1978).

B. Proceedings Before the PUC; the Federal Questions

Since 1913, New Hampshire has had in effect a statutory scheme — now codified in relevant part in NH RSA 374:35 — requiring utilities which operate hydroelectric units in New Hampshire to obtain permission from the PUC to transmit their electricity to points outside New Hampshire. Prior to the instant proceeding, the PUC had never withheld such permission.

On November 21, 1979, the PUC instituted its first investigation under the statute to determine whether it should withdraw permission previously granted NEP to export hydroelectric energy generated at NEP's Connecticut River plants. In December 1979, NEP moved to dismiss the proceedings on the ground that the PUC lacked authority under the statute to prohibit the export of hydroelectric energy. NEP challenged the statute, as invoked by the PUC, on three federal grounds: (1) it would place an undue burden on interstate commerce, (2) it is preempted by FERC licensing authority over NEP's hydroelectric projects under Part I of the Federal Power Act, and (3) it is preempted by FERC's regulation of NEP's wholesale sales under Part II of the Act.

The PUC deferred ruling on NEP's motion to dismiss and conducted hearings on the merits of an export restriction. Finally, on August 27, 1980, the PUC denied NEP's motion and held that RSA 374:35 validly confers juris-

diction on the PUC to restrict hydroelectric exports (App. B, pp. 15a-24a).

On September 19, 1980, the PUC issued its Report and Order on the merits (App. C, pp. 25a-40a). The PUC withdrew permission to export hydroelectric energy and directed NEP to make arrangements to sell the energy solely to utilities or consumers within New Hampshire (App. C, p. 40a). The PUC did not, however, order NEP to prevent the energy from physically crossing state lines. Under the PUC's order, this hydroelectric energy will continue to be delivered to the regional transmission network; the economic benefits of the energy, however, will be confined to New Hampshire.

C. The Decision Below

NEP appealed the PUC's August 27 and September 19 orders to the New Hampshire Supreme Court asserting the same federal constitutional and statutory challenges it had raised before the PUC. The court rejected NEP's federal claims and upheld RSA 374:35 as applied by the PUC (App. A, pp. 1a-14a).

The court concluded that the New Hampshire export statute as applied by the PUC did not run afoul of the Commerce Clause (App. A, pp. 6a-8a, 10a-12a). In the court's view, Congress affirmatively granted the state authority to restrict hydroelectric exports by inserting a savings clause in Section 201(b) of Part II of the Federal Power Act (App. A, pp. 7a-8a).

The court also found no conflict between the New Hampshire statute as applied by the PUC and the regulatory schemes embodied in Parts I and II of the Federal Power Act. The court reconciled the PUC's order with FERC's

exclusive Part II jurisdiction over wholesale electric rates by characterizing the order as no more than an assertion of "control of the assignment of the power" (App. A, p. 12a). At the same time, however, the court acknowledged that to accomplish this reassignment "new rates, contract modifications, or accounting adjustments . . . may naturally flow from the export termination" (App. A, p. 14a).

The court remanded the case to the PUC for implementation, concluding (*id.*):

> [NEP] must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power.

THE QUESTIONS ARE SUBSTANTIAL

New Hampshire's attempt to secure the economic benefits of hydroelectric generation exclusively for its own citizens raises fundamental questions under the Commerce and Supremacy Clauses of the Constitution. If allowed to stand, New Hampshire's action will frustrate implementation of regional and national solutions to today's energy crisis. Other states with significant energy resources will be encouraged to stop sharing them or impose onerous conditions on their sale in interstate commerce.

The Court has already set down for plenary review another state's attempt through an exorbitant coal severance tax to impede interstate commerce. *Commonwealth Edison Co.* v. *Montana*, No. 80-581, probable jurisdiction noted, — U.S. —, 49 U.S.L.W. 3428 (Dec. 9, 1980). New Hampshire's scheme is even more blunt. New Hampshire seeks not to tax a commodity destined for interstate commerce; it seeks to capture the *entire* economic advantage of hydroelectric energy already in interstate commerce.

The decision below upholding New Hampshire's hydroelectric export statute as applied by the PUC is inconsistent with the fundamental values underlying the Commerce Clause. It also undercuts the federal regulatory framework embodied in Parts I and II of the Federal Power Act for the development of hydroelectric projects for the benefit of interstate commerce and for the regulation of wholesale sales of electric energy in interstate commerce. Plenary review is warranted.

1. New Hampshire's Hydroelectric Export Statute as Applied by the PUC Violates the Commerce Clause

The PUC's Order applying NH RSA 374:35 unduly burdens interstate commerce by preventing NEP from selling its hydroelectric generation outside New Hampshire. The power to regulate commerce among the states is a federal power, vested in Congress by the Commerce Clause. Absent Congressional consent, a state may not unduly burden interstate commerce. For this reason, state attempts to bar goods from or regulate the sale of goods in interstate commerce have been consistently invalidated. See, *e.g.*, *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) ("*West*"), which invalidated a state statute prohibiting exportation of natural gas, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) ("*Attleboro*"), which invalidated state regulation of the interstate sale of electricity at wholesale, and *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), which invalidated a state statute prohibiting transportation and sale of minnows out of state.

These decisions are grounded in the philosophy, manifested in the Commerce Clause, that state regulation of interstate commerce will endanger the public interest in a

national economy by encouraging trade wars between the states, *West, supra,* 221 U.S. at 255-56, and by preventing " . . . the free flow of both raw materials and finished goods in response to the economic laws of supply and demand". *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976). The importance of energy supplies to the vitality of the national economy, and to the New England economy in particular, is beyond question. Since the New Hampshire statute as applied by the PUC flatly prohibits the sharing of significant energy resources between consumers of electricity in New Hampshire and in its neighboring states, the statute so applied violates the Commerce Clause.

The New Hampshire Supreme Court conceded that the export statute, standing alone, would probably violate the Commerce Clause (App. A, p. 10a). The court, however, read the savings clause in Section 201(b) of the Federal Power Act (16 U.S.C. 824(b))[2] as an affirmative grant of power by Congress to the states to regulate the exportation of hydroelectric energy (App. A, pp. 7a-8a). The court totally misconstrued the savings clause.

Section 201(b) was passed in 1935 as part of Congress' effort to plug the gap caused by *Attleboro's* prohibition seven years earlier against state regulation of interstate sales of electricity at wholesale. The result was Part II of the Federal Power Act (16 U.S.C. §§ 824-824k) which vests exclusive jurisdiction over such sales in FERC. *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953) *("California").*

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[2] Section 201(b) provides in pertinent part:

(1) The provisions of [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

Contrary to the ruling below, Section 201(b) does not purport affirmatively to grant authority; it merely directs that nothing in Part II should be construed to preempt existing lawful state authority. The words "deprive" and "lawful authority now exercised" are not words of grant, but words insulating valid laws regulating hydroelectric exports from the preemptive reach of Part II. This is the thrust of the savings clause's legislative history, in which Congressman Rogers of New Hampshire feared that the original Senate version, not containing a savings clause, would "deprive certain states . . . of certain rights which they have over exportation of hydroelectricity which is transmitted across the State line."[3] He therefore asked that New Hampshire be allowed "to continue . . . to exercise" those rights. 79 Cong. Rec. 10527 (1935).

This Court recently ruled that a savings clause in another federal statute strikingly similar to Section 201(b) does not confer additional authority upon the states otherwise barred by the Commerce Clause. *Lewis* v. *B T Investment Managers*, 447 U.S. 27, 64 L. Ed. 2d 702, 720 (1980). The Court found nothing in the savings clause or its legislative history indicating a Congressional intent to give the states new power not already possessed. Instead, "it appears that Congress' concern was to define the extent of the federal legislation's preemptive effect on state law." *Id.*

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[3] Prior to Part II's enactment in 1935, three states in addition to New Hampshire had statutes regulating the export of hydroelectric energy: Maine Rev. Stat. (1916), ch. 60, sec. I, p. 985; Maine Rev. Stat. (1930), ch. 68, sec. 1; Wisconsin Stat. (1931), sec. 31.27; West Virginia Acts (1929), ch. 58. Maine has since repealed its law. Public Laws of Maine (1955), ch. 402, p. 400. West Virgina's export statute was held unconstitutional on other grounds in 1931. *Hodges* v. *Public Service Commission*, 110 W. Va. 649, 159 S.E. 834 (1931). The Wisconsin statute is currently codified at sec. 196; 375 Wisc. Stats. (1977).

Nothing in the language or legislative history of Section 201(b) suggests that Congress intended to exempt state hydroelectric export statutes from the restrictions of the Commerce Clause. When Congress has wished to express such an intent, it has done so explicitly, using language that specifically allows a state to regulate certain interstate commerce as though it were purely local. See, *e.g.*, *In re Rahrer*, 140 U.S. 545 (1891) (upholding the Wilson Act of 1890, 26 Stat. 313); *Clark Distilling Co.* v. *Western Md. Ry.*, 242 U.S. 311 (1917) (upholding the Webb-Kenyon Act of 1913, 37 Stat. 699); and *Whitfield* v. *Ohio*, 297 U.S. 431 (1936) (upholding the Hawes-Cooper Act of 1929, 45 Stat. 1084).[4] The Section 201(b) savings clause bears no resemblance to the specific Congressional authorizations in those cases. Absent such explicit authorization, the state statute must be judged in the first instance under traditional Commerce Clause standards. See, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 620 n.4 (1978) (concluding that even a broad savings clause providing that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies" did not shield a state waste disposal law from the restrictions of the Commerce Clause).

In short, the narrow savings clause contained in Section 201(b) does not insulate the New Hampshire export statute from scrutiny under the Commerce Clause, and the statute clearly cannot withstand that scrutiny. New Hampshire's attempt to hoard the economic benefit of its natural resources contravenes the central principles underlying the

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[4] These cases serve as the authority for the proposition that Congress may "permit the States to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).

Commerce Clause. See *Hughes* v. *Oklahoma, supra; H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *West, supra.*[5]

2. The New Hampshire Statute as Applied by the PUC is Preempted by Part I of the Federal Power Act

NEP's hydroelectric projects are licensed by FERC under Part I on the assumption that their electric generation will benefit interstate commerce. Part I was enacted to provide for ". . . the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest . . ." *Federal Power Commission* v. *Union Electric Company*, 381 U.S. 90, 98 (1965). "The principle use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." *Id.*, 381 U.S. at 99.

To this end, Congress established in Part I a comprehensive regulatory scheme which conditions the construction and operation of hydroelectric projects on navigable waters upon the issuance of a license by FERC. Section 4(e) (16 U.S.C. § 797(e)) establishes federal licensing jurisdiction over any person desiring to construct, operate, or maintain a facility for the development, transmission, and utili-

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[5] We do not argue that all applications of the New Hampshire statute would be invalid under the Commerce Clause. Carefully tailored state regulation of the physical exportation of hydroelectric energy to conserve scarce water resources or to protect health threatened by the unavailability of electricity would not unduly burden interstate commerce. *Compare, Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 186-88 (1950). In this case, however, the state has acted solely to gain an economic advantage for its citizens.

zation of water power on navigable waters. Such licenses are issued on the condition, among others, that the project " . . . will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . ." Section 10(a) (16 U.S.C. § 803(a)).

To determine whether a proposed project constitutes the best comprehensive plan for "interstate commerce", FERC must consider, as a central part of its analysis, the extent to which the project will contribute to the interstate transmission of electricity. *Federal Power Commission* v. *Union Electric Co., supra,* 381 U.S. at 100-01. Thus, when FERC issues a license for a hydroelectric project under Part I of the Federal Power Act, it does so on the condition that the energy generated thereby will be used to benefit interstate commerce.

Nothing in Part I authorizes the states to defeat the purpose of federal licensure, since federal authority in this field is exclusive and final. See *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 165-166, 181 (1946). To hold otherwise would grant the states a "veto power [which] easily could destroy the effectiveness of the federal act . . . [and] would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission. . . . " *Id.,* 328 U.S. at 164.

The Connecticut River was found to be navigable in 1941. *Bellows Falls Hydro-Electric Corp.,* 2 F.P.C. 380 (1941). Since then, each of the six hydroelectric stations involved in this case has been and is now licensed under Part I of the Federal Power Act. By attempting to retain the economic benefits of hydroelectric energy generated at these stations

exclusively for New Hampshire residents, the PUC challenges the premise of federal licensure — that the Nation's waterways shall be developed for national, rather than local and parochial advantage. Since there is nothing in Part I which saves New Hampshire's export restriction from preemption, the New Hampshire statute as applied by the PUC must fall under the Supremacy Clause.

The Section 201(b) savings clause, which on its face applies only to Part II of the Act, does not insulate the New Hampshire statute from Part I preemption. The 1935 savings clause, however, does implicitly recognize some "lawful authority" of the states over hydroelectric exports. The savings clause and Part I are easily reconciled.

As originally enacted in 1920, Part I left relatively unregulated hydroelectric projects on non-navigable waters. Part I was extended by a non-retroactive 1935 amendment to projects which might affect interstate commerce. Section 23(b) (16 U.S.C. § 817). Thus, in 1935, there were many hydroelectric projects free of federal licensing requirements. In fact, NEP's New Hampshire projects had not then been licensed since that part of the Connecticut River was not then thought to be navigable. In enacting the Section 201(b) savings clause, Congress would have seen no Part I barrier to the application of state export statutes to many hydroelectric projects.

3. The New Hampshire Statute as Applied by the PUC is Preempted by Part II of the Federal Power Act

As the New Hampshire Supreme Court recognized (App. A, p. 14a), the PUC's Order will ultimately require NEP to rearrange its existing wholesale rates and contracts. Yet, Part II of the Federal Power Act (16 U.S.C. §§ 824-824k)

grants FERC comprehensive and exclusive jurisdiction over the interstate transmission and sale of electricity at wholesale, *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 215 (1964) (*"City of Colton"*), including transmission and sales from hydroelectric projects licensed under Part I. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 418-9 (1952). Since the PUC's order far exceeds the limited state authority over hydroelectric energy exports recognized by Congress in Section 201(b) of Part II, it is inconsistent with FERC's pervasive regulation of interstate wholesale electric energy transactions under Part II. It therefore must give way to superior federal authority.

As noted *supra*, Part II was passed in response to this Court's decision in *Attleboro* that states have no authority to regulate wholesale sales of electricity transmitted in interstate commerce. Congress gave that authority to FERC in Part II by declaring that federal regulation of such sales is in the public interest, Section 201(a) (16 U.S.C. § 824(a)), and by allowing federal jurisdiction to follow the physical flow of such energy across state lines. Section 201(b) (16 U.S.C. § 824(b)); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 529 (1945). FERC jurisdiction over the interstate transmission and sale of electricity at wholesale exists no matter how small the quantity of interstate transmission is involved. *Federal Power Commission* v. *Florida Power & Light*, 404 U.S. 453, 461 n. 10 (1972).

Part II applies with full force to NEP's business, which consists almost entirely of the interstate sale of electricity at wholesale. NEP's transmission lines are interconnected with NEPOOL's interstate transmission network to enable NEP's generating units to be dispatched by NEPOOL.

NEP sells electric power at wholesale to three affiliated retail distribution companies, and to some thirty non-affiliated utilities, in Massachusetts, New Hampshire and Rhode Island. By virtue of the integration of its multistate facilities which support its interstate sales of electricity at wholesale, NEP is regulated by FERC. See *Connecticut Light & Power Co.* v. *Federal Power Commission, supra; Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U.S. 61, 67-68, 70-71 (1943).

The PUC's order directly interferes with FERC's regulation by directing NEP to make arrangements for the sale of its hydroelectric energy to New Hampshire customers. This order will require NEP substantially to alter its current contracts, rates, and services which are already subject to exclusive FERC regulation. NEP will have to offer new contracts to New Hampshire utilities to cover the sale of the hydroelectric energy. NEP will also have to change its wholesale rates for all of its remaining customers to reflect the fact that only its New Hampshire customers will receive the benefits and associated costs of this hydroelectric energy.

If done by NEP independently, any such rearrangement of its existing array of wholesale contracts would require FERC approval. The new "arrangements", whatever their form, would be contracts or rates for wholesale electric service in interstate commerce. Since Section 205(b) of Part II (16 U.S.C. § 824d(b)) prohibits discrimination in rates "as between localities", it is doubtful that FERC would approve any filing package that secured the economic benefits of hydroelectric power for a class of wholesale customers in one locality (New Hampshire) to the detriment of wholesale customers in other localities (Massachusetts and Rhode Island).

In any event, New Hampshire lacks the authority to order a rearrangement of NEP's wholesale contracts and tariffs. Whatever state authority over hydroelectric energy is preserved by the Section 201(b) savings clause, authority over wholesale sales from an integrated, interstate power grid is not included. As this Court has expressly noted, the hydroelectric export savings clause "appears not to have been drafted with state rate regulation in mind," but was intended to preserve the validity of state statutes prohibiting or regulating the "*volume* of state power exported." *California, supra,* 345 U.S. at 300-301 n. 4 (emphasis added). By contrast, the PUC's order does not touch the volume of hydroelectric energy physically flowing across New Hampshire borders. The energy will continue to flow in the New England grid as dispatched by NEPOOL. Instead, the PUC has simply ordered an adjustment in wholesale tariffs to accomplish a transfer of the economic benefits of the power. This action is preempted by Part II.

CONCLUSION

Probable jurisdiction should be noted. The Court may want to consider summary reversal.

Respectfully submitted,

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January 1981.

APPENDIX A

[OPINION AND JUDGMENT OF
NEW HAMPSHIRE SUPREME COURT]

PUBLIC UTILITIES COMMISSION

No. 80-396

APPEAL OF NEW ENGLAND POWER COMPANY

(Public Utilities Commission)

December 23, 1980

• • •

DOUGLAS, J. This case involves the validity of an order of the New Hampshire Public Utilities Commission (hereinafter "PUC") pursuant to RSA 374:35 withdrawing from the New England Power Company (hereinafter "NEPCO") permission to transmit hydroelectricity generated in New Hampshire to other States. We affirm the order and remand.

On November 21, 1979, the PUC instituted an investigation under RSA 374:35 to determine whether it should revoke its earlier approval of the exportation of electric power generated by hydroelectric facilities located in New Hampshire. RSA 374:35 provides:

> "*Transmitting Electricity Out of the State Permission Required.* No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such

business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use."

NEPCO moved to dismiss the proceedings for lack of subject matter jurisdiction. The PUC denied the motion. On September 19, 1980, after several hearings, the PUC issued the order in controversy, and NEPCO filed a timely appeal to this court. The order reads as follows:

"ORDERED, that the permission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn as of thirty (30) days from the date of this Order; and it is

FURTHER ORDERED, that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire within thirty (30) days of the date of this Order; and it is

FURTHER ORDERED, that upon the completion of both units at Seabrook the Commission will again re-examine the issue of exportation."

We granted a stay of the order to preserve the status quo ante pending our decision on the merits.

I. BACKGROUND

NEPCO is a public utility predominantly engaged in the generation of electricity for sale in the wholesale market. As part of its generating mix, NEPCO owns and operates six hydroelectric generating stations comprised of twenty-seven units along the Connecticut River in New Hampshire and Vermont. All six stations are federally licensed under Part I of the Federal Power Act, 16 U.S.C. §§ 792-823. The

twenty-one units located in New Hampshire have a capacity of 420 megawatts.

NEPCO sells the power produced by these stations to wholesale customers in New Hampshire, Massachusetts, and Rhode Island. The energy is dispatched through a regional power-pooling system composed of sixty utilities in New England (NEPOOL), comprising ninety-eight per cent of the generating capacity in New England. NEPCO sells seventy-five per cent of its power in Massachusetts. Less than six per cent of New Hampshire's population presently receives energy from NEPCO's regular wholesale customers.

Uniquely, while the Connecticut River separates the States of Vermont and New Hampshire, the river up to the low water mark on the Vermont side lies *within* the State of New Hampshire. *Vermont* v. *New Hampshire*, 289 U.S 593, 619-20 (1933); *see* RSA 1:1 to :8. The northern part of the Connecticut River is, therefore, owned by the people of the State of New Hampshire. *See McGilvra* v. *Ross*, 215 U.S. 70, 79 (1909). The right of private parties to use it to produce electricity for use outside New Hampshire has been limited by RSA 374:35, :36, with the PUC, in effect, the citizens' legislatively delegated "trustee."

Pursuant to its statutory authority, the PUC has, from time to time, approved NEPCO's requests to export hydroelectric power. *See, e.g., Connecticut River Power Co. & New England Power Company*, 36 N.H.P.U.C. 302, 311-12 (1954); *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929). NEPCO concedes that since 1926 it or a predecessor company has obtained permission from the PUC to export electricity from all plants in New Hampshire except Vernon Station, which was constructed prior to 1913.

According to the PUC, the surplus of power produced in New Hampshire during the first half of this century justified the PUC's grants of permission to export in those years. In the late 1920's hydroelectricity provided forty-five per cent of New Hampshire's energy and, with the exception of Maine, this was the highest percentage of electricity so produced anywhere in the country. In 1951 the percentage had risen to forty-nine per cent. Today, the biggest retail seller of electricity in the State, Public Service Company of New Hampshire, serves eighty-three per cent of the population, but its generating mix includes only 4.6 per cent produced by hydroelectric stations, according to the PUC. NHPUC Report accompanying Order 14,492 at 6 (Sept. 19, 1980).

II. The Federal Power Act

NEPCO argues that Parts I and II of the Federal Power Act, 16 U.S.C. §§ 792-824k, preempt RSA 374:35. Traditionally, the regulation of electric utilities was a function performed by State governments under their police power. Federal legislation may supersede such State regulation, but only if Congress expressly so provides or if Federal and State laws conflict. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). When it enacted Parts I and II of the Federal Power Act, Congress did not expressly preempt State law as it has in other statutes. *See, e.g.*, Depository Institutions Deregulation and Monetary Control Act of 1980 § 511 (a), Pub. L. No. 96-221, 94 Stat. 132 (to be codified in 12 U.S.C. § 86a); Act of December 28, 1979 § 202, amending the Federal Deposit Insurance Act (12 U.S.C. § 1811-1831), Pub. L. No. 96-161, 93 Stat. 1233 (to be codified in 12 U.S.C. § 1831a). Our inquiry, therefore, must

be whether the federal law so conflicts with State law as to preempt it.

Congress' primary objective in enacting Part I of the Federal Power Act, 16 U.S.C. §§ 792-823, was to control comprehensively the development of water power along the nation's navigable waterways through the issuance of licenses to construct and operate dams and reservoirs. *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 400-05 (1975). Congress did not preempt the entire field of electric utility regulation when it enacted Part I, which left the States with their traditional jurisdiction over electric utilities, except for matters relating to the issuance of licenses. *See First Iowa Coop.* v. *Power Comm'n*, 328 U.S. 152, 171 (1946). For example, State regulation of intrastate sales of electricity to ultimate consumers, such as the retail customers of Public Service Company of New Hampshire, remains in State hands. 16 U.S.C. § 813.

NEPCO argues that the PUC's interpretation and application of RSA 374:35 conflicts with the licensing power of the federal government under Part I. We disagree. The PUC's order does not require compliance with RSA 374:35 as a condition precedent to securing a federal license under Part I. *See First Iowa Coop.* v. *Power Comm'n, supra* at 170. New Hampshire has not sought to stop hydroelectric development of the Connecticut River and does not challenge the licenses granted to NEPCO over the years under Part I of the Federal Power Act. Because we find that there is no conflict between RSA 374:35 and Part I, we conclude that the federal statute does not preempt the State law.

The more difficult question is whether Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, preempts RSA

374:35. Seven years after the enactment of Part I, Rhode Island sought to regulate the rates at which a utility within that State sold power to a wholesale customer in Massachusetts. The Supreme Court of the United States held that such rate regulation was an impermissible burden on interstate commerce. *Pub. Util. Comm'n* v. *Attleboro Co.*, 273 U.S. 83, 90 (1927).

As a result of the *Attleboro* decision, there was no regulation of interstate electric rates. Such regulation is within the exclusive domain of Congress under the commerce clause. *Id.* In 1935, Congress chose to fill the gap by enacting Part II. The legislative history of that amendment includes the following:

> "Title II of the bill makes certain amendments to the present Federal Water Power Act and establishes for the first time regulation of electric utility companies transmitting energy in interstate commerce . . . . Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.*, (273 U.S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates."

H.R. REP. NO. 1318, 74th Cong. 1st Sess. 7-8 (1935). Thus, Congress clearly expressed an intention to preempt the field of regulation of rates charged in the *interstate* transmission of electricity.

However, § 201(b) of the statute specifically exempted certain State laws from federal jurisdiction. As enacted, that subsection provided:

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but *shall not apply* to any other sale of electric

> energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line . . ."

(emphasis added). 49 Stat. 847 (current version at 16 U.S.C. § 924(b) (Supp. 1980)).

The legislative history of that section explains the purpose of that language. When the bill reached the House of Representatives, the Senate version did not contain the language regarding "lawful" authority of States to control the flow of hydroelectricity produced by their waters; the House Commerce Committee inserted it. H.R. REP NO. 1318, 74 Cong. 1st Sess. 27 (1935). Said Congressman Rogers of New Hampshire:

> "Just one further word. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior Senator from New Hampshire [Senator Fred H. Brown] on the public service commission of our State, we for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses [public utility companies]; but the Senate bill as originally drawn would deprive certain states, I think *five* in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House Committee, and I hope when you come to it, section 201 of part II, that you will *grant* us the privilege to continue, as we have been for *22 years*, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of New Hampshire."

79 CONG. REC. 10527 (1935) (emphasis added). The twenty-two years refers quite obviously to the 1913 legislation in New Hampshire amending the 1911 Public Service Commission Act, presently RSA 374:35. Thus the subsec-

tion was specifically intended to preserve the power of a State or its commission over exportation of electricity under then existing laws similar to the New Hampshire statute, which were recognized as valid and lawful. *See Safe Harbor Water Power Corporation*, 5 F.P.C. 221, 235 (1946); *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 300 n.4 (1953).

III. Federal Constitution

The Commonwealth of Massachusetts, and other amici curiae, argue that Congress could not constitutionally enact § 201(b). They assert that, while Congress may exempt *all* States from an exercise of congressional authority under the commerce clause, it may not legislate with respect to some States and exempt others. But the amici present no authority. Nothing requires that the commerce clause be exercised in a totally uniform manner geographically. *Secretary of Agri.* v. *Cent. Roig Co.*, 338 U.S. 604, 616 (1950). In fact, the Supreme Court has expressly noted that there is no rule that Congress must legislate equally with respect to all States or not at all. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-29 (1966).

The amici argue that the privileges and immunities clause of the United States Constitution, U. S. CONST. art. IV, § 2, also prohibits such an act of Congress. The only authority they are able to cite is a footnote in a treatise, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-31 at 403 n.18 (1978). We are unable, however, to find a single case that holds that the privileges and immunities clause restricts Congress's power under the commerce clause. *See generally Haavik* v. *Alaska Packers Ass'n*, 263 U.S. 510, 515 (1924); *Duchay* v. *Acacia Mut. Life Ins. Co.*, 105 F.2d

768, 775 (D.C. Cir. 1939); *Lung* v. *O'Cheskey*, 358 F.Supp. 928, 931 (D.N.M.), *aff'd mem.*, 414 U.S. 802 (1973). The fact that Article IV generally applies to the States leads us to conclude that the privileges and immunities clause was meant to apply to the States and not to Congress.

Massachusetts argues that if the PUC order goes into effect consumers in that State will be deprived of property without just compensation in violation of the fourteenth amendment of the U.S. Constitution. We find that argument to be without merit. Massachusetts's argument is based on the speculative premise that NEPCO will be able to increase its rates to consumers in that State to reflect the loss of cheaper hydroelectric power but that NEPCO will not make adjustments to offset the expenses of operating and maintaining those plants. NEPCO, however, is subject to the Federal Energy Regulatory Commission's (hereinafter "FERC") jurisdiction in the establishment of rates. 16 U.S.C. § 824d. *Cf. FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972). FERC has the authority to hold hearings upon the lawfulness of any proposed rate and to suspend a rate change pending the hearing. 16 U.S.C. § 824d(e). The burden of proof that an increased rate is just and reasonable is upon the utility. *Id.* Massachusetts has not shown us that its projected scenario will ever occur. If it does, the Commonwealth may raise its argument at that time.

Relying on *Fry* v. *United States*, Massachusetts argues that the tenth amendment prohibits Congress from exercising its power under the commerce clause "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. 542, 547 n.7 (1975). That phrase, however, refers to the function of the States

vis-a-vis the federal government and not with respect to other States. The tenth amendment prohibits the federal government from infringing on State sovereignty with regard to "integral governmental functions." *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976). Regulation of electric utilities is not an essential State governmental function, and the tenth amendment does not prohibit the act of Congress in this case.

NEPCO argues that RSA 374:35 as construed and applied in the PUC order violates the commerce clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3.

New Hampshire was one of the thirteen sovereign States that created the federal government and delegated to it certain enumerated powers, among which was the power of Congress to regulate commerce among the States. U.S. CONST. art. I, § 8, cl. 3. Control over the interstate transmission of electricity is within the commerce power of Congress. *FPC* v. *Union Electric Co.*, 381 U.S. 90, 94 (1965); *Pub. Util. Comm'n.* v. *Attleboro Co.*, 273 U.S. at 86. Congress exercised that power when it enacted the Federal Power Act, 16 U.S.C. §§ 792-828c. In issuing its order, the PUC acted within its authority as expressly preserved by § 201(b) of that act. 16 U.S.C. § 824(b). While it might be questionable, in the absence of § 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States, *see Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), that is not the case here. Congress, through its commerce clause power may "permit the states to regulate the commerce in a manner which would not otherwise be permissible. . . . " *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).

NEPCO correctly points out that the United States Supreme Court has ruled that parochial State laws that impede the flow of goods or natural resources into interstate commerce are infirm under the commerce clause. *See, e.g., Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949) (milk); *Foster Packing Co.* v. *Haydel*, 278 U.S. 1 (1928) (shrimp); *Oklahoma* v. *Kansas Nat. Gas Co.*, 221 U.S. 229 (1922) (natural gas). *But see Reeves, Inc.* v. *Stake*, 48 U.S.L.W. 4746, 4750 (June 19, 1980) (upholding the right of South Dakota to withhold processed cement, which it produces, from the interstate market). Those cases are distinguishable in that none of them involved the express consent of Congress in the exercise of its commerce power.

The question remains whether the PUC's order falls within the exemption provided by Congress. NEPCO and the other States argue that the PUC order is an attempt to control electric rates in violation of the commerce clause. They assert that all hydroelectric power goes into an interstate transmission grid and is mixed with other power, but the PUC does not intend that NEPCO cut its lines running from its hydroelectric plants into the grid and construct new lines running only to New Hampshire utilities. Rather, NEPCO argues that the PUC intends that NEPCO simply adjust its rates to give New Hampshire consumers the benefit of the price of hydroelectricity.

The PUC order is plain. Under RSA 374:35 it withdraws permission to export hydroelectric power and orders that it be sold to New Hampshire consumers. Its purpose is to give New Hampshire the benefit of that power of which its residents now get only about six per cent. Since the power is presently mixed in the grid, NEPCO must decide what part of the power is being assigned to Massachusetts and Rhode Island in order to determine its charges to custom-

ers in those States. It can comply with the PUC's order not to export hydroelectric power by the same method and simply determine that all of the hydroelectric power going into the grid is assigned to New Hampshire. This is not a control of rates but rather a control of the assignment of the power. If NEPCO can now determine that over ninety per cent is going outside New Hampshire, it can determine that one hundred per cent will remain in New Hampshire.

The PUC does not challenge the jurisdiction of the FERC (as successor to the Federal Power Commission) over utilities selling solely in intrastate markets energy that has been generated wholly or in part from out of State. *See FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972); *F.P.C.* v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964). The latter cases did not turn on the *mere interconnection* of a utility with an interstate transmission grid because just about every utility in the country is so connected. If the matter were that simple, then FERC, and not the fifty State regulatory bodies, would control all but the most remote, miniscule, and obscure utilities in the country.

The PUC did not err in its construction of the State statute at issue and properly gave notice and held lengthy hearings and investigations during the past year. Our sister States could and did fully participate before the PUC.

IV. Findings of the PUC

Next, NEPCO asserts that the PUC's findings are unjust and unreasonable. This court will not overturn the PUC unless its findings are arbitrary, unjust, or unreasonable as a matter of State law. *Legislative Util. Consumers' Council* v. *Public Util. Com.*, 117 N.H. 972, 974, 380 A.2d 1083, 1084 (1977). The question is not whether *some* power is now

needed in New Hampshire but whether the PUC is justified in concluding that *hydro*-generated power "is reasonably required for use within this state and that the public good requires that it be delivered for such use." RSA 374:35.

New Hampshire is the fastest growing State north of Florida and east of the Mississippi River. The population of the State rose 21.5 per cent from 1960 to 1970 and 24.6 per cent from 1970 to 1980, approximately 1.6 times faster than the entire nation and 1.7 times faster than the region from 1960 to 1970. Rhode Island has actually lost population during the last few years. The growth in power demand in New Hampshire may outpace capacity by 1982-83. We cannot conclude that the PUC was in error or that it did not have sufficient evidence before it when it declined to predict whether the capacity of the Seabrook Nuclear Power Station would alleviate that shortfall.

The PUC concluded that hydroelectric power is cheaper to the extent of approximately $25 million a year, depending on seasonal flow of the river and other factors. That power would help replace the expensive oil-fired generation on which most of New Hampshire now depends. One expert pointed out that the Public Service Company of New Hampshire's rate per kilowatt hour exceeds NEPCO's rate by about 25 per cent. Due to line losses, hydroelectric power can be more economically delivered in this State. Rates to New Hampshire consumers are higher due to the lack of access to New Hampshire's major hydroelectric stations' output; the dollar savings to New Hampshire consumers, if the power is sold within this State, would be substantial.

RSA 374:35 clearly authorizes the action of the PUC. Authority under the statute is not confined to situations where there is a shortage of power regardless of price but

whenever it is "reasonably required for use within the State." When the cost of power produced by other methods becomes exorbitant, the less expensive hydroelectric power becomes reasonably required for use within the State. The economic needs of New Hampshire consumers are such that the public good requires that the hydroelectric power be delivered for their use instead of being exported. We find no retaliatory or improper motive on the part of the PUC. There is no "public good" in requiring New Hampshire to import expensive OPEC oil so that it may continue to export the cheaper hydroelectric power. We uphold the findings of the PUC.

V. Implementation

Finally, NEPCO argues that the PUC order is so vague and ambiguous that it cannot comply. Nothing on the face of the PUC order requires new rates, contract modifications, or accounting adjustments, but these may naturally flow from the export termination. The PUC has required NEPCO "to make arrangements to sell" its hydroelectric power in New Hampshire, and NEPCO must do so. It is not clear to this court how some of these "arrangements" will be made. We therefore remand for the parties to develop the mechanics of implementation. NEPCO must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power.

Remanded.

All concurred.

APPENDIX B

[PUC Report and Order No. 14,456]

DE 79-223

NEW ENGLAND POWER COMPANY

[Entered August 27, 1980]

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REPORT

On December 28, 1979, New England Power Company (NEPCO) filed a Motion to Dismiss in these proceedings for lack of subject matter jurisdiction. NEPCO contends that NHRSA 374:35 cannot constitutionally confer jurisdiction on the New Hampshire Public Utilities Commission to regulate NEPCO's transfer of hydroelectricity from New Hampshire. Further, NEPCO alleges that such regulation is invalid under both the Commerce Clause of the United States Constitution and the Federal Power Act.*

NEPCO argues that the Commission is precluded from action pursuant to RSA 374:35 as a result of Supreme Court decisions precluding a state from imposing an undue burden on interstate commerce. The interstate transmission of electric current from one state to another NEPCO views as interstate commerce. Thus, NEPCO arrives at the conclusion that a state cannot enact or enforce any regulation

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* The Rhode Island Attorney General agrees with NEPCO on the matter of jurisdiction.

which unduly burdens or discriminates against the interstate transmission of electricity. *Attleboro Steam & Electric Co.* v. *Public Utilities Commission*, 273 U.S. 83 (1927). Based on the aforementioned reasoning, NEPCO concludes that any action pursuant to NHRSA 374:35 is an unconstitutional exercise of state power.

NEPCO then proceeds to embark on a discussion of the various Supreme Court cases which warn of the balkanization of the states' unity and the potential for rivalries and retaliation if one state is allowed to prohibit or restrict interstate commerce. *West* v. *Kansas Natural Gas*, 221 U.S. 229, 249-255 (1911). *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). *Hood* v. *DuMond*, 366 U.S. 525, 538-539 (1949).

To illustrate the potential for retaliation, NEPCO cited the interconnections of NEPOOL and the potential for other New England states to preclude New Hampshire from the benefits of New England nuclear units outside New Hampshire.

These arguments lead to NEPCO's assertion that a state is without power to burden interstate commerce in this fashion for the exclusive benefit of its own residents. Consequently, NEPCO finalizes this argument by stating that NHRSA 374:35 and any order issued pursuant to the statute are unconstitutional by operation of the Interstate Commerce Clause of the United States Constitution.

NEPCO also challenges the Commission's jurisdiction under the Federal Power Act. While noting that portions of the Federal Power Act leave limited authority to the states with respect to the hydroelectric projects, NEPCO

offers the proposition that no provision authorizes a state prohibition on the exportation of hydroelectric power. NEPCO further argues that state laws such as RSA 374:35 are pre-empted because otherwise such laws would interfere or frustrate the Federal Energy Regulatory Commission's (FERC) overall scheme of water utilization.

NEPCO concedes that Part II of the Federal Power Act provides that no state will be deprived of its lawful authority now exercised over the exportation of hydroelectric power. In pursuit of its motion, NEPCO offers that exemptions such as the aforementioned must be narrowly construed. Furthermore, NEPCO contends that the rate-making provisions of the Federal Power Act clearly define the FERC's jurisdiction on rates. For the aforementioned reasons NEPCO submits that the proceeding in DE 79-223 should be dismissed for lack of subject matter jurisdiction.

COMMISSION ANALYSIS

Article I, Section 8, Clause 3 of the United States Constitution confers upon the Congress of the United States the authority to regulate interstate commerce. While that authority is exclusively in the United States in some instances, it does reside concurrently with the states in other instances. The authority of the states to regulate interstate commerce can be divided into two categories, when Congress has acted and when it has not.

Where Congress has not acted, the states may not regulate interstate commerce if the state's regulation would place an undue burden on that commerce or where the article of commerce is so national in nature as to be amenable only to a national scheme of regulation. Where these two factors are not present the states may regulate inter-

state commerce in the absence of legislation by the United States.

Where Congress has acted, the states may exercise their authority over the article of interstate commerce concurrently with the United States unless the state's regulation is inconsistent with the scheme of regulation adopted by the United States, or where the United States has entirely pre-empted the field.

A review of NEPCO's contentions reveal that they cannot be sustained.[1] It is well settled that a state may not, upon its own authority, prohibit the introduction of an article into interstate commerce. *West* v. *Kansas Natural Gas Company*, 221 U.S. 229, 55 L.Ed. 716 (1911). However, the Congress may authorize a state to regulate interstate commerce where, but for such authorization, the state would be prohibited from doing so. *Auclair Transportation Inc.* v. *State*, 113 N.H. 231, 234 (1973).

In the field of the generation and sale of electrical energy, the Congress has enacted a scheme of regulation which, while reserving certain aspects of the subject to the United States, is scrupulous in its recognition and preservation of the interests of the several states. 16 U.S.C.A. 792 *et seq.* *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.Ed. 1020 (1952). In that legislation the Congress has authorized the states to regulate the exportation of hydroelectric energy generated within the state, at least insofar as the states exercised such control over that hydroelectric energy in 1920. 16 U.S.C.A. 824 (b). That section, as amended through the present states:

"The provisions of this subchapter (subchapter II) . . . *shall not . . . deprive a State or a State Commission* of

[1] The Commission has sought the opinion of its attorney in the Attorney General's office. His analysis concurs with our analysis.

its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line . . ." (Emphasis supplied)

When the bill, which subsequently became the aforementioned statute, was introduced into the House of Representatives it failed to contain the quoted clause. However, the bill was amended so as to insert the quoted clause. Speaking in support of the addition of that clause, Representative William A. Rogers of New Hampshire stated that the bill, as originally drafted, would have deprived certain states of "certain rights which they have over the exportation of hydroelectric energy", and that the amendment would preserve those rights. 79 *Cong. Rec.* 10527.

The Federal Power Commission, the agency charged with the enforcement of the statute held:

"The legislative history of this provision *79 Cong. Rec. 10527* shows that it has reference to certain existing state statutes which purported to prohibit or restrict the exportation of hydroelectric energy. Eg., *Me. Rev. Stat. (1930) ch. 68 sec. 1; N.H. Laws (1929) ch. 106; W. Va. Acts (1929) ch. 58; Wis. Stat. (1931) sec. 31.27.*" *Safe Harbor Water Power Corporation*, 5 FPC 221, 235 (1946).

The aforementioned interpretation was approved by the United States Supreme Court in *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.Ed. 1020, 1029-1030, at note 4. There the Supreme Court verified that the statute was "intended to preserve the validity of certain state statutes prohibiting or regulating the volume of state power exported."

To clarify, the Congress specifically recognized the interests of the State of New Hampshire in controlling the use of its hydroelectric energy and specifically authorized the State of New Hampshire to exercise that control. The

statute under which this Commission has conducted this proceeding was specifically recognized by the federal agency charged with administering the federal regulatory scheme as coming within the grant of authority to the states. Finally, that construction was specifically approved by the United States Supreme Court. The various cases cited by NEPCO describe generally accepted principles of federal supremacy but are inapplicable to the instant case because of the specific grant of authority.

NEPCO's arguments fail to focus on the specific question of whether or not this State has the authority to determine where the power from hydroelectric plants located within the State (*State of Vermont* v. *State of New Hampshire*, 290 U.S. 579 (1934)) can be sold. The Commission answers this question in the affirmative.

Past decisions of this Commission clearly support the Commission's finding. In *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929) this Commission clearly conditioned its permission to transfer the power out of state. The following is taken from the report and order of Commissioner Mayland H. Morse:

> Said Grafton Power Company shall discontinue such business in whole or in part, to such extent and under such notice as the commission may order, whenever after notice and hearing thereon the Public Service Commission shall find that such electrical energy, or any portion thereof affected by this order is reasonably required for use within this state, and that the public good requires that it be delivered for such use. (Page 201)

Similar passages appear in all orders issued by this Commission whereby permission was granted to transmit the power outside the State. When New England Power came

before the Commission in 1954, 19 years after the amendments to the Federal Power Act, the company specifically requested that the Commission "permit and approve New England Power Company's engaging in such business, including the transmitting or conveying of electrical energy generated by water power beyond the confines of New Hampshire." (NEPCO's Petition dated November 15, 1954).

In the Commission's report and order in that case the following condition was imposed to the approval:

> "Further ordered, that New England Power Company be, and hereby is, permitted to engage in the business of transmitting or conveying electrical energy generated by water beyond the confines of New Hampshire on the statutory conditions of sections 33 and 34 of Chapter 289 of the Revised Laws of New Hampshire, as amended, namely, that New England Power Company shall discontinue such export, in whole or in part, to such extent and under such conditions as this Commission may order, if this Commission finds that such electrical energy or any portion thereof is reasonably required for use within this State, and that the public good requires that it be delivered for such use, such service within this State to be upon terms as favorable as shall be granted to consumers outside the State, having due regard for all the facts and conditions which may affect the subject."

Connecticut River Power Co. & New England Power Company, 36 N.H.P.U.C. 302, 311-312 (December 3, 1954).

Therefore, it is clear that NEPCO by its 1954 petition recognized the Commission's jurisdiction and authority as to the transmission of hydroelectric power outside the State. The order in that proceeding specifically conditioned the approval on the possibility that at sometime in the future the permission could be discontinued. Finally, NEPCO did not appeal the Commission's aforementioned

order. Based on the foregoing NEPCO can neither claim lack of subject matter jurisdiction, lack of notice, or surprise.

NEPCO's concerns relating to balkanization and retaliation are unfounded. First, as has been noted this specific delegation refers only to hydroelectric power. The possibility for retribution by disallowing New Hampshire access to nuclear plants in other states cannot be reasonably offered considering that New Hampshire utilities have an ownership interest in all New England Yankee Nuclear units. As to withholding power from oil units, given today's economics it is doubtful that this would occur or be a potential threat. However, each of these scenarios implies that New Hampshire has chosen a path of balkanization. Such a conclusion fails to recognize over fifty years of sharing one of its most vital resources, the Connecticut River. New Hampshire was sharing its resources decades before the creation of the New England Power Pool.

An historical examination of our files reveals that the aforementioned 1954-NEPCO decision was issued before proceedings accepting the arrangement were heard by the Massachusetts Department of Public Utilities. (December 3rd vs December 7, 1954). Clearly the Massachusetts DPU was aware of the terms imposed by the New Hampshire Commission. Furthermore, the creation of NEPOOL years later was based upon consideration of the existing laws within each New England State.

Finally, recognition must be given to the specific policy determination by the United States Congress which specifically continued the statutory lives of the existing hydroelectric exportation statutes in the four states of which only New Hampshire's remains. This jurisdiction is not a delib-

erate attempt at balkanization but rather a sanctioned power belonging to the State of New Hampshire.

Based upon the foregoing, the Commission denies the NEPCO motion to dismiss. Our Order will issue accordingly.

J. MICHAEL LOVE
Chairman

Concurring:
August 27, 1980

PAUL R. MCQUADE, *Commissioner*

FRANCIS J. RIORDAN, *Commissioner*

DE 79-223

NEW ENGLAND POWER COMPANY

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SUPPLEMENTAL ORDER No. 14,456

Upon consideration of the foregoing Report, which is made part of this Order, it is hereby

ORDERED, that the Motion to Dismiss filed by New England Power Company is denied.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of August, 1980.

VINCENT J. IACOPINO
Executive Director and Secretary

APPENDIX C

[PUC Report and Order No. 14,492]

DE 79-223

INVESTIGATION INTO THE TRANSFER OF HYDRO-ELECTRIC POWER OUTSIDE OF NEW HAMPSHIRE

[Entered September 19, 1980]

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REPORT

Jurisdictional Challenges

The Commission by Report and Supplemental Order No. 14,456 has already determined jurisdiction over the exportation of hydro-electric power pursuant to RSA 374:35 and 36. Contrary to the assertions of NEPCO and the Rhode Island Attorney General, there remains life in these two statutes. The Commission, in the aforementioned Order, cited the various provisions of the Federal Power Act that allowed the continuation of state jurisdiction in the area of hydro-electric exportation. The Commission noted that through the efforts of New Hampshire Congressman William A. Rogers, the Congress passed the amended Federal Power Act which specifically reserved existing state rights over the exportation of hydro-electric power produced within the State. *Safe Harbor Water Power Corporation*, 5 FPC 221, 235 (1946). With the passage of the Federal Power Act, there existed four states which had existing statutes controlling the exportation of hydro-electric power: Maine Revised Statutes (1930) ch. 68, section 1; West Vir-

ginia Acts (1929) chapter 58; Wisconsin Statutes (1931) section 31.27 and New Hampshire Laws (1929) chapter 106. These four statutes, which prohibited or regulated the exportation of state power, were held to have continuing validity by the United States Supreme Court. *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.Ed. 1020, 1029-1030, Note 4.

The Commission proceeded to analyze its past decisions where the Commission consistently reserved its statutory right to alter in whole or in part any approval to transfer hydro-electric power outside the State. *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929); *Connecticut River Power Co. & New England Power Company*, 36 N.H.P.U.C. 302, 311-312 (December 3, 1954). The Commission noted that NEPCO itself sought our approval in the latter proceeding through its initial petition (NEPCO's petition dated November 15, 1954).

Further research has revealed that contrary to its present position, New England Power specifically recognized the Commission's continuing jurisdiction as to the exportation of hydro-electric power *after* the passage of the Federal Power Act in *1935*. The following passage from New England Power Company's *1948* Prospectus[1] is illustrative and conclusive as to jurisdiction:

> In the case of a company engaged in the generation of electric energy by water power in New Hampshire, such company is prohibited from transmitting such energy outside of New Hampshire unless the company first obtains the consent of the New Hampshire Public Service Commission. The statute provides for the discontinuance of such transmission outside of New Hampshire to

[1] NEPCO, First Mortgage Bonds, Series B, 3%, dated July 1, 1948.

the extent the New Hampshire Public Service Commission finds that the electrical energy is reasonably required in New Hampshire. No such consent has been obtained with reference to energy generated at the Bellows Falls Development or at the present Wilder Development of Bellows Falls Hydro-Electric Corporation because such generation is in Vermont. However, the Company is bound by a stipulation given in 1927 by Bellows Falls Hydro-Electric Corporation to the State of New Hampshire, that electricity should be delivered in New Hampshire for use within that State in such amount as should be ordered by the New Hampshire Public Service Commission under such regulations as to rates and service as may be from time to time determined by such Commission. No such orders have been issued pursuant to this stipulation. Consent has been obtained for the transmission out of New Hampshire of such energy to be generated at the Wilder Development following the redevelopment as is, at the time, in excess of that which can be marketed within the state at fair rates. (Page 18) Exhibit X-3 NHPUC Docket D-#2771, FPC Docket #E6145.

The Commission has found through its analysis in Order No. 14,456 that it has jurisdiction pursuant to RSA 374:35 and 36 to evaluate the remaining questions in this proceeding. NEPCO's position in the past has been that this Commission has the jurisdiction and the power to consider approving or halting the transfer of hydro-electric power outside the boundaries of the State. NEPCO has not offered any compelling legal criteria as to why its position of today is contrary to its position in 1948 and 1954.

Statutory Requirements of RSA 374:35

RSA 374:35 states the following:

Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the

same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

To alter or to discontinue an approval to transmit hydroelectric energy beyond the confines of the State, RSA 374:35 sets forth certain requirements and standards to be considered.

The first statutory requirement imposed upon the Commission is notice to New England Power and subsequent hearings thereon. This requirement has been satisfied by the Commission's Report and Order No. 13,913 and the subsequent hearings held pursuant to this docket.

The statute then proceeds to impose two standards. The first is a finding that the electrical energy or the portion thereof affected by an order is reasonably required for use within the State of New Hampshire. The second necessary evaluation relates to the question of whether or not the public good requires that the hydroelectric power be delivered for use within the State.

Electrical Energy Need Within the State of New Hampshire

There are five hydroelectric projects presently located along the Connecticut River within the boundaries of the State of New Hampshire. At these five sites, there are twenty-one units which have a total capacity of 419.8 megawatts.[2] The amount of energy generated by these units has averaged nearly a billion kilowatt hours a year over the past six years.[3] These units were built primarily within the time frame of 1920 to 1956.[4] The permission granted to transmit this hydroelectric power outside the State was first provided in 1929 and continued through subsequent decisions to 1954.[5] This proceeding is the first re-examination of this issue since that time period.

The population growth rate in New Hampshire has increased dramatically since 1954. In the time period between 1960 and 1970, New Hampshire added 130,760 people or a 21.5% increase.[6] Between 1970 and 1980 the State population increased by another 24.6%.[7]

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[2] NEPCO Exhibit 1-D

[3] Staff Exhibit #9 Schedule I

[4] NEPCO Exhibit 1-B

[5] *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929) *Connecticut River Power Company & New England Power Company*, 36 N.H.P.U.C. 302, 311-312 (December 3, 1954)

[6] LUCC Exhibit I

[7] 1980 United States Census

In comparison with both the United States and New England as an entirety, New Hampshire grew considerably faster over the 1960 to 1980 time period. During 1960 to 1970, New Hampshire grew at a rate 1.7 times faster than the region as a whole, which then increased to a rate of 5.5 times faster for the second decade. New England's slow growth rate can largely be attributed to an essentially stagnant growth period in Southern New England.[8]

The magnitude of this stagnation in Southern New England is illustrated by Rhode Island's actual net population loss over this period. Equally relevant is the testimony that New Hampshire's growth is primarily from immigration of which the leading contributor was Massachusetts at 39%.[9]

The relevance of these population trends to the issues in this proceeding is extremely clear. Since the last PUC order allowing the transmission of this hydroelectric power outside the State, consumers in Massachusetts and Rhode Island have been receiving ever increasing levels of New Hampshire hydroelectric power per customer while New Hampshire has been receiving dramatically lesser power on per customer basis from units located within the State. The immigration of people from the remainder of New England to New Hampshire has resulted in a shift in the very market that the prior exportation orders were designed to serve.

Another example of the changed circumstances facing New Hampshire's energy future is in the comparison of the generating sources serving New Hampshire presently

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[8] LUCC Exhibit I

[9] LUCC Exhibit I

and the generation mix when the permission to export the hydroelectric power was first granted. In the late 1920's, New Hampshire had forty-five percent of its electrical energy provided by hydroelectric power. With the exception of Maine, this was the highest percentage of any state in the United States.[10] Equally impressive, New Hampshire also had the second lowest level of purchased power indicating a high degree of self-sufficiency.[11] In 1951, New Hampshire had over forty-nine percent of its electrical energy needs met by hydroelectric generation.[12] Obviously, there was a surplus of hydroelectric power which justified the orders granting permission to export of the 1920's and 1950's.

The present generating mix is markedly different from that encountered in the 1920's and 1950's. The state's largest electric utility, Public Service Company of New Hampshire serves 83% of the total population in the state. Its generating mix includes only 4.6% of the power generated by hydroelectric plants.[13] The available hydroelectric energy is from the 48 MW of hydro capacity which PSNH owns.[14]

New England Power Company provides energy to less than 6% of the State's population, and has a maximum

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[10] *Grafton Power Company*, 12 N.H.P.S.C. 194 (1929). Commission file D-1222 "Electrical World" June 2, 1928 p. 1179. DE 79-208 *Small Power Producers and Cogenerators* Report and Order #14,470 p. 4

[11] "Electrical World" June 2, 1928 p. 1179

[12] *Small Power Producers and Cogenerators* DE 79-208 Report and Order #14,470

[13] Staff Exhibit 9 Schedule VIII

[14] Transcript, January 29, 1980, p. 24

peak of 79 MW.[15] Yet New England Power Company has 419.8 MW of hydroelectric capacity which is used by and large to service consumers outside New Hampshire.

The effect of this unbalanced use of hydroelectric generation is the major reason for the higher costs per KWH of PSNH, by approximately 25% over NEPCO as demonstrated by Staff witness Gertler.[16]

Another factor that relates to an accurate assessment of the electrical energy needs of New Hampshire is the projected load growth within the State and the plants scheduled to meet that need in the future. Staff # 1 and 8 are NEPOOL's most recent peak growth projections in which the data is segregated and examined by state. These exhibits predict that the load growth in New Hampshire will be higher over the next ten years than either Massachusetts or Rhode Island. NEPOOL predicts in this 1979 study that the load growth in New Hampshire will in the base case be 5.0%.

PSNH's most recent, 1980, forecast predicts a peak growth of 5.0% for its system. When the Commission examined PSNH's 1979 peak load projection, the Commission determined that at that time the proper range was between 4.2% and 5.0%.[17] Staff has used the 5.0% prediction to examine peak growth for the next ten years and the plants scheduled to meet the increased demand. Staff witness Traum expressed concern that during certain years between now and when both units are operational at Seabrook, PSNH may be required to enter into contracts for one or two entitlements in existing units. Mr. Traum's

[15] Staff Exhibit 6, Schedule II

[16] Staff Exhibit 8, Schedule IV

[17] Commission Docket I-SF 14,829- 14,831 (1979)

exhibits also reveal entitlements purchased from *NEPCO* for oil fired capacity in certain years before the completion of Seabrook.[18]

Staff witness Traum's testimony reveals two key determinants for answering the question of New Hampshire's energy needs. First, the fact that PSNH will need to make additional purchases of capacity in the years leading to the completion of Seabrook establishes an available market for the hydroelectric power within the State. Second, his analysis reveals that at the same time that NEPCO is exporting hydroelectric power from New Hampshire, it is planning to enter into contracts to transfer oil generated power back into the State to serve the energy needs of the electric utility, PSNH, which provides electrical power to 83% of New Hampshire's residents either directly or indirectly. Such an ironical situation clearly establishes the market for the electrical energy from the hydroelectric plants along the Connecticut River within this State.

Staff witness Traum also examined the plants scheduled to meet the State's energy needs in the future, Seabrook I and II. Mr. Traum noted that the projected in-service dates for these units have always been delayed, never advanced. Based on this historical analysis and the reduction in the construction work force, Mr. Traum reached the conclusion that Seabrook I and II would not be in service on the dates presently predicted by PSNH, April 1, 1983 and February 1, 1985 respectively.

Mr. Traum then proceeded to develop an historical delay regression which yielded a set of different in service dates which he then averaged with PSNH's present estimate to arrive at a revised estimate for the two in-service dates of

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[18] Staff Exhibit #6 Schedule 4

1985 and 1989. This led Mr. Traum to his ultimate conclusion that the longer the delay is in bringing Seabrook into service, the more compelling the need for the hydroelectric power to remain in New Hampshire.

Recently, the Commission reviewed the projections of in service dates for both Seabrook units. The Commission concluded that the various labor strikes coupled with the volatile financial markets and the failure of the Massachusetts DPU to approve the divesture had postponed the operational dates for Seabrook I and II to 1984 and 1986, respectively.[19] While continued delay in the divesture approval may result in further delay because of our recent order in DR 79-187, it is clearly established that the delay in these units requires that the State have access to the energy and capacity from the hydroelectric units on the Connecticut River at least until the completion of both Seabrook units.

NEPCO contends in brief that the new 1980 NEPOOL forecast may lend to a lower peak growth projection for the State of New Hampshire. However, the new forecast does not provide a state by state breakdown. Consequently, the Commission will have to await the completion of its examination of this issue pursuant to DE 80-47. The evidence offered by NEPCO does not in of itself prove that the demand of PSNH has changed due to the absence of state by state data. Furthermore, the delays in the completion date of the two Seabrook units coupled with NEPCO's exportation of hydroelectric power while attempting to sell back to New Hampshire oil fired electricity outweighs any consideration as to NEPCO's contention.

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[19] DR 79-187 Report and Order #14,490 page 9 footnotes 12-16 (Sept. 18, 1980)

The Commission finds that based on the testimony and exhibits of witnesses Traum, Gertler and MacLellan, there has been a demonstrated need for the hydroelectric power presently being exported outside the State and that it is reasonably required for use within the State. Factors, which include the delay of both Seabrook I and II, the increased population in the State since the decisions allowing export, the worsening generation mix, NEPCO's practice of selling to PSNH oil fired capacity while exporting New Hampshire hydro capacity, as well as the unfavorable distribution of hydroelectric facilities in service to New Hampshire residents, all clearly support this finding both individually and collectively.

PUBLIC GOOD STANDARD

The public good can be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources. Staff witness Gertler testified that if the exportation of the hydroelectric power was discontinued and the power was used within the State of New Hampshire, there would be an annual savings of approximately 25 million dollars a year.[20] Such a result is clearly within the realm of the public good because of its extremely beneficial effect on the citizens of the State of New Hampshire. Ms. Gertler's analysis disclosed that the per capita income for the State of New Hampshire has been and is presently below that of the states in Southern New England. Ms. Gertler's analysis also revealed that the price paid for electrical energy in New Hampshire is higher than NEPCO's price for the states it serves.

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[20] Staff Exhibit 9

The historical records contained in the Commission files reveal that there was substantial takings of New Hampshire land for purposes of flooding, and construction of the various hydroelectric units and supporting structures. See *Grafton Power Company*, 12 N.H.P.S.C. 194 (1929), *Connecticut River Power Company & New England Power Company*, 36 N.H.P.U.C. 302 (1954) (also interim transfers contained in our files). These takings created a vested interest in the plants for the citizens of New Hampshire. Contrary to the Massachusetts A.G's position, the Commission has not ignored the concerns of other States rather the Commission has reviewed its past records to reveal all the considerations that led to the earlier exportation orders.

The aforementioned decisions reveal that all financings, construction and operation of these hydroelectric facilities was done with a clear recognition that the State of New Hampshire had made considerable efforts to assist the development of these units and the only consideration given to New Hampshire was that upon the appearance of a market for the power within the State, the power would be delivered. Questioning by the existing Attorney General for New Hampshire in 1928 revealed that the power could always be delivered cheaper within the State than outside the State because of line losses. (See Transcript September 21, 1928 page 25 *Grafton Power* docket). A state has an interest in controlling the use of its natural resources. Such conditions that are necessary to protect the misuse of these limited resources falls within the public good.

The testimony in this proceeding reveals that the continued allowance of exportation of this power directly harms the public of the State of New Hampshire. Recently, PSNH sought temporary loans from its Seabrook partners so as to be able to continue the construction of Seabrook

until the next major financing. NEPCO, a partner in the ownership of Seabrook, refused to loan the money unless PSNH agreed to buy any necessary capacity from NEPCO that it might need between the present and the advent of Seabrook no matter what the cost.[21] PSNH refused and NEPCO chose not to make the temporary loan thereby jeopardizing the continuation of the plant.

Testimony in DR 79-187, which the Commission administratively takes notice, reveals that on at least one other occasion NEPCO attempted to impose conditions on a short term temporary loan and seriously jeopardized the continuation of the plant. In making the aforementioned condition concerning power purchases, NEPCO was able to rely upon its excess capacity situation which is in part directly related to its ability to export the Connecticut River hydroelectric power. Since the Commission has found the construction of Seabrook to be in the public interest, an use of our natural resources which jeopardizes this interest cannot be viewed as within the public good.

Equally distressing is the conflicting positions of the Massachusetts Attorney General. In proceedings before the Massachusetts DPU, the Mass. Attorney General has continually attempted to block the Seabrook divesture based in large part on the need for power.[22] Yet again the exportation of the hydroelectric power allows another interest in another state to use the exported power as a lever to block actions which will greatly aid the public good within the State of New Hampshire. It is directly contrary to the State of New Hampshire's interest to have an officer

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[21] July 29, 1980 Transcript page 70 through 74

[22] DR 79-187 Report and Order #13,962, page 11 (December 26, 1979)

of another state attempt to block efforts to establish new energy sources found to be in the public good while relying upon energy and capacity from this State. Obviously, the continuation of exportation would lead to further incorrect economic signals.

The hydroelectric power from the Connecticut River dams is presently used for peaking with some use as base load. The units PSNH will be buying from prior to the completion of the two Seabrook units will also be peaking but with one major difference, they will be oil fired. There is a substantial difference between the costs of this hydroelectric power and power generated from oil fired units. To allow PSNH and other New Hampshire utilities to be forced to increase the amount of their generating capacity by turning to oil fired units when there exists hydroelectric peaking power within the State would not be in the public good.

The Commission has found that any increased usage within the State will be met by increased reliance upon oil until the units at Seabrook can be completed and the Schiller Station converted to coal.[23] Since the Staff exhibits 1, 6, and 8 all reveal that there will be growth in energy usage during the years leading to the operation of Seabrook, it is clear that the public good requires greater use of the State's natural resources so as to reduce the reliance upon oil for increased usage of electricity.

The Commission has already discussed that regardless of any order of this Commission Seabrook I and II have been delayed to 1984 and 1986. This delay gives further support to finding that the public good requires a discon-

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[23] DR 79-187 Report and Order #14,490 (December 26, 1979)

tinuance of the transfer of hydroelectric power outside the State at least until the two plants are built.

Upon a review of the two standards set forth by RSA 374: 35, the Commission finds that there is a market for the hydroelectric power presently being exported out of the State and that the power is reasonably required for use within the State. The Commission further finds, that the discontinuance of the exportation of the power in lieu of use within the boundaries of the State is in the public good at least until the two units are operational at Seabrook.

Our Order will issue accordingly:

J. MICHAEL LOVE PAUL R. McQUADE FRANCIS J. RIORDAN

COMMISSIONERS

September 19, 1980

INVESTIGATION INTO THE TRANSFER OF HYDRO-ELECTRIC POWER OUTSIDE OF NEW HAMPSHIRE

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SECOND SUPPLEMENTAL ORDER No. 14,492

Upon consideration of the foregoing Report, which is made a part hereof; it is

ORDERED, that the permission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn as of thirty (30) days from the date of this Order; and it is

FURTHER ORDERED, that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire within thirty (30) days of the date of this Order; and it is

FURTHER ORDERED, that upon the completion of both units at Seabrook the Commission will again re-examine the issue of exportation.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of September, 1980.

/s/ VINCENT J. IACOPINO

VINCENT J. IACOPINO
Executive Director and Secretary

APPENDIX D

[NOTICE OF APPEAL]

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

APPEAL OF NEW ENGLAND POWER COMPANY
Docket No. 80-396

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
[Filed January 12, 1981]

Notice is hereby given that New England Power Company, the appellant above-named, hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2) from the final judgment of the New Hampshire Supreme Court entered on December 23, 1980, which upheld against constitutional challenge, NH RSA 374:35 and Order No. 14,492 of the New Hampshire Public Utilities Commission.

Respectfully submitted,

NEW ENGLAND POWER COMPANY

By its attorney

/s/ RICHARD B. COUSER, Esquire

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APPENDIX E

FEDERAL POWER ACT

Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)) The Commission is hereby authorized and empowered —

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(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations. *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United

States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* that upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * *

Section 10(a) of the Federal Power Act (16 U.S.C. § 803 (a))

All licenses issued under this Part [I] shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development,

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and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

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Section 23(b) of the Federal Power Act (16 U.S.C. § 817(b))

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State or municipality shall not construct,

maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

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Sections 201(a) and 201(b) of the Federal Power Act
(16 U.S.C. §§ 824(a) and 824(b))

(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part [II] and the Part next following [III] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the United States.

(b)(1) The provisions of this Part [II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part [II] and

the Part next following [III], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

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Section 205(b) of the Federal Power Act
(16 U.S.C. § 824(b))

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.